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IN THE

SUPREME COURT OF THE UNITED STATES

APRIL TERM, A. D. 1941

ERNEST E. MARKS COMPANY, A CORPORATION,
(*Plaintiff*) *Appellant,*

vs.

THE UNITED STATES OF AMERICA,
(*Defendant*) *Appellee.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS AND BRIEF IN SUPPORT THEREOF.

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INDEX.

	PAGE
Summary Statement of the Case	2, 10
Basis of Jurisdiction	5, 9
Questions Presented	6
Reasons Relied On for Allowance of Writ:	
I—Constitutionality of Sub-section 350 (b)	7
II—Treaty with Argentina	7
III—Importance of Questions	7
IV—Novelty of Questions	8
Opinions of the Courts Below	9
Specification of Errors	10
Summary of Argument	11
Argument:	
I—Exclusive Preferential Does Not Exceed Twenty Per Cent	13
II—Section 350 Does Not Authorize Exclusively Preferential Treatment of Cuban Imports	14
III—Sub-section 350 (b) Is Unconstitutional and void	16
IV—Argentine Treaty Violated	17
Conclusion	18

STATUTE, TRADE AGREEMENT AND TREATY.

Cuban Trade Agreement of 1934	19, 20
Section 350, Amendment to Tariff Act of 1930	20, 21
United States—Argentine Republic, Treaty	6

PAGE

TABLE OF CASES AND AUTHORITIES.

Bartram v. Robertson, 122 U. S. 116 17
Black, Interpretation of Statutes, 1911, at pages 45 to 55 15
F. H. Von Damm v. U. S., 25 C.C.P.A. 97, at page 103 14
Hampton, Jr. & Company v. U. S., 276 U. S. 624..... 16
Maltus v. U. S., 6 Ct. Cust. Appls. 525 15
Procter & Gamble Mfg. Co. v. U. S., 19 C.C.P.A. 415, at page 418 15
Whitney v. Robertson, 120 U. S. 190 17
Woodbury v. Berry, 18 Ohio St. 456 15

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Ernest E. Marks Company, plaintiff and appellant below, prays that a writ of certiorari issue to review the final order entered February 3, 1941, by the United States Court of Customs and Patent Appeals (Presiding Judge Garrett, and Associate Judges Bland, Hatfield, Lenroot, and Jackson) confirming the judgment of the United States Customs Court, Third Division (Evans, J.), entered March 21, 1940, overruling the plaintiff's protest against the decision of the Collector of Customs of the Port of Chicago.

SUMMARY STATEMENT OF THE CASE.

The case involves the correct rate of duty upon corn imported into the United States from the Republic of Argentina in the year 1936. The protest is representative of many other protests pending in the Port of Chicago and in other Ports, which other protests have been suspended under this case. The aggregate number of bushels of corn involved in all of these protests is estimated to exceed thirty million, and the total duties claimed by all of these importers to have been illegally collected are estimated as in excess of four million dollars.

Paragraph 724 of the Tariff Act of 1930 provides a duty rate upon corn at 25¢ per bushel. Section 350 as an amendment to the 1930 Tariff Act provided that the President might enter into foreign trade agreements with foreign governments and thereby modify the duty rate upon articles specified in such trade agreements by not more than fifty per centum, but that (Sub-section (b)) nothing in said amendatory act should be construed to prevent the application of the provisions of the Treaty of Commercial Reciprocity concluded between the United States and the Republic of Cuba on December 11, 1902, or to preclude giving effect to an exclusive agreement with Cuba concluded under said section, modifying the existing preferential customs treatment of articles the growth, produce, or manufacture of Cuba.

(Section 350 is set out in full in footnote 1, Appendix, pp. 19, 20.)

Pursuant to said Section 350, the President in 1934 proclaimed a trade agreement with the Republic of Cuba in and by which the duty rate upon corn (among other commodities) imported into the United States from Cuba was reduced to 10¢ per bushel. 10¢ per bushel was fifty per cent

of the then duty rate on Cuban corn, which rate under the Treaty of Commercial Reciprocity of 1902 was 20¢ per bushel rather than 25¢, Cuba, under said treaty, having been accorded a twenty per cent preferential rate as against other nations.

(The salient provisions of the Cuban Trade Agreement are hereunder set out in footnote 2, Appendix, pp. 20, 21.)

Sub-section 350 (a) provided that when the President should reduce duty rates in a trade agreement concluded thereunder with one nation, the reduced duty rates shall apply to articles the growth, produce, or manufacture of all foreign countries which the President finds do not discriminate against the United States. This is the so-called generalization provision, corresponding to the favored nation clauses of treaties.

The importer herein contended therefore that the President had thereby reduced the duty rate on corn imported from Cuba to 10¢ per bushel, and that the duty rate upon the corn in question in this protest was therefore reduced to 12½¢ per bushel, *i.e.*, to the amount of the Cuban reduction subject to the fifty per cent limitation. The importer demanded a refund accordingly, not only under the provisions of said Section 350, but also pursuant to the favored nation clause of the existing treaty with Argentina.

The defendant's answer to this contention was that the Cuban Trade Agreement provided that duty rate reductions accorded by the United States upon articles imported from Cuba were, by the terms of the agreement, made exclusively preferential to Cuba, and therefore were not generalized in favor of Argentina. To this, the importer's reply is:

(a) That the only portion of the reduction which was exclusively preferential to Cuba, as authorized by

Section 350, or as provided for in the Trade Agreement, was twenty per cent below the lowest rate charged upon importations from any other nation. Therefore, the preferential was exclusive to the extent of twenty per cent only, and the balance of the duty rate reduction was generalized, and duties should be refunded accordingly.

(b) That no possible authorization for an exclusively preferential rate reduction upon Cuban imports can be found in Section 350, since Cuba is referred to therein only in Sub-section (b), which simply provides that nothing contained in the authorizing Sub-section (a) shall *preclude* the President from giving effect to an exclusive agreement with Cuba. To state that nothing shall preclude the President is not an authorization, and the President was not thereby in any sense empowered to grant an exclusive preferential to Cuba. If the agreement purported to grant any such, the grant was void; and the rate reductions must therefore be generalized—in this case, in favor of the importer of Argentine corn.

(c) That Sub-section 350 (b), because it laid down no principle or yardstick whereby the President should be guided in determining when or under what conditions an exclusively preferential agreement with Cuba might be made, if deemed to have any affirmative significance, amounted to a delegation of legislative power to the President, and therefore is unconstitutional and void; in which case the reductions made for Cuba must also be generalized to Argentina under the broad generalization provision of Sub-section 350 (a).

The Customs Court and the United States Court of Customs and Patent Appeals held that Sub-section 350 (b) did authorize an exclusively preferential reduction upon Cuban

imports; did not decide whether or not Sub-section 350 (b) delegates a legislative function to the President and did not decide whether or not this sub-section is constitutional; and denied the importer's claim for refunds of that portion of the duties which were assessed and collected which the importer contends were illegally exacted. It is conceded by the defendant, we believe, that if Sub-section 350 (b) does not authorize the exclusive, or that if it is not constitutional, that the generalization clause of Subsection 350 (a) is applicable, and that the importer in such case would be entitled to the refunds.

BASIS OF JURISDICTION.

Jurisdiction of this court is invoked under the provisions of Section 195 of the Judicial Code as amended (U. S. Code Ann. Title 28, Sec. 308), providing for review of the judgments and decrees of the United States Court of Customs and Patents Appeals by this court upon certiorari. The order of the United States Court of Customs and Patent Appeals, affirming the judgment of the United States Customs Court, was entered on February 3, 1941. Application for a writ of certiorari is required to be made within three months after the final order of the United States Court of Customs and Patent Appeals (U. S. Code Ann. Title 28, Sec. 350), or, in this case, on or before May 3, 1941.

The Statutes of the United States, the validity of which is involved, are:

1—Sub-section 350 (b), enacted June 12, 1934, entitled "An Act to Amend the Tariff Act of 1930."

2—The Reciprocal Trade Agreement between the United States and the Republic of Cuba proclaimed August 24, 1934 (48 Stat. 943) in its provisions therein contained in Article III that articles the growth,

produce, or manufacture of the Republic of Cuba enumerated and described in Schedule II annexed thereto, should, on their importation into the United States of America, be granted exclusive and preferential reductions in duties.

The treaty, the integrity of which is involved, is the Treaty of 1853 between the United States and the Republic of Argentina, ratified by the Congress of the United States in the year 1855, in respect of Article IV thereof, which provides that no higher or other duty shall be imposed upon the importation into the territories of the two contracting parties, of any article of the growth, produce or manufacture of the territory of the other contracting party, than are, or shall be, payable on the like article of any other foreign country.

QUESTIONS PRESENTED.

Stated by the United States Court of Customs and Patent Appeals:

Whether Section 350, the Reciprocal Trade Agreement Act of 1934, authorized the President to make an exclusively preferential trade agreement with Cuba which would not be subject to the so-called generalization clause.

Whether said Trade Agreement was in fact such an exclusive agreement, none of the provisions of which inured to the benefit of any other foreign country.

Whether Sub-section 350 (b) of the Tariff Act authorized the granting of an exclusive preferential to Cuba.

Whether said Sub-section 350 (b) is constitutional.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.—CONSTITUTIONALITY OF SUB-SECTION 350(b).

The constitutionality of this Section is attacked by the importer in this case, and the issue of its constitutionality should be determined by this Court because of the far-reaching importance of this question.

II.—TREATY WITH ARGENTINA.

The importer herein contends that the decision of the lower Court violates the favored nation clause of the Treaty of Commercial Reciprocity between the United States and the Republic of Argentina, and until the United States Supreme Court has decided this issue, neither the American public, nor the Republic of Argentina can know whether or not this Treaty is being violated.

III.—IMPORTANCE OF QUESTIONS.

The Reciprocal Trade Agreements Act resulted in the proclaiming by the President of the United States of the Cuban Trade Agreement whereby tariff rates on dozens of articles imported into the United States have been reduced by fifty per cent. The applicability of the generalization proviso of Section 350 to these reductions is of immense importance to American importers and consumers and to foreign nations and their exporters. If the statute is in whole or in part invalid or otherwise insufficient to support a Cuban exclusive preferential, that fact should be so determined, at once, and for all time, by this Court, so that the same may be redrafted by the Congress if it shall so desire, or if it shall be found by this Court to be valid and subsisting, so that the public, and officials of all governments concerned, may be so notified.

IV.—NOVELTY OF QUESTIONS.

(a) The question of whether the Cuban Trade Agreement is preferential to the extent of one hundred per cent of the reduction in duty rates accorded Cuba, or only to the extent of twenty per cent of such reduction, has been before the United States Customs Court and the United States Court of Customs and Patent Appeals numerous times, yet the question has never been passed upon by the United States Supreme Court.

(b) The question of whether Section 350, the amendment to the Tariff Act of 1930, authorized the President to make an exclusively preferential trade agreement, has been passed upon by the United States Court of Customs and Patent Appeals, but has never been adjudicated by this Court.

(c) The question of the constitutionality of Sub-section 350 (b) of said Reciprocal Trade Agreements Act, has been considered but once (in the case at bar in the Court below, which did not decide the question of its constitutionality) and never has been decided by this Court.

* * * * * * *

WHEREFORE your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Court to review the order and judgment of the United States Court of Customs and Patent Appeals, and that the order of said Court be reversed, and this cause be remanded with directions to sustain the plaintiff's protest and order refunds accordingly.

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